**STATE OF ILLINOIS**

**HUMAN RIGHTS COMMISSION**

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| **IN THE MATTER OF:** | ) | |
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| **EDWARD W. BOOKS, JR.,** | ) | |
| | ) | |
| **Complainant,** | ) | |
| | ) | |
| **and** | ) | **CHARGE NO: 1977BN0137** |
| | ) | **EEOC NO:** |
| **CITY OF NORMAL, NORMAL FIRE & POLICE COMMISSION,** | ) | **ALS NO: S-8915R** |
| | ) | |
| **Respondent.** | ) | |

# RECOMMENDED ORDER AND DECISION

This matter comes to me on a motion by Complainant, Edward W. Books, Jr., for summary decision on the instant Complaint alleging under the Fair Employment Practices Act (FEPA) that he was the victim of handicap discrimination based upon a 1976 decision by Respondent not to hire him as a firefighter. Respondent has filed a response to this motion, as well as a cross-motion for summary decision alleging that Complainant's back impairment (i.e., spondylolisthesis) is not a qualifying condition covered by the terms of the FEPA. Respondent has also filed a separate motion for partial summary judgment, requesting that the instant Complaint be dismissed on various procedural grounds. Complainant has filed responses to both motions, as well as a reply to his motion for summary decision. Moreover, Respondent has filed a reply to Complainant's responses to the cross-motion for partial summary decision, as well as the cross-motion for summary judgment on liability. Finally, Complainant has filed a motion seeking to amend the instant Complaint to allege that Respondent "regarded" his back impairment as a substantial limitation of one or more major life activities. Respondent has filed a response to this motion. Accordingly, all matters are ripe for a decision.

## Contentions of the Parties

As to Complainant's motion for summary decision, Complainant asserts that he is entitled to a summary decision because the record shows that: (1) he was handicapped under the FEPA at the time he applied for the subject firefighter position; (2) Respondent knew or perceived him to have a handicap when it refused to hire him as a firefighter; (3) Respondent denied him employment as a firefighter without making an individualized assessment of his ability to perform the duties of the firefighter position; and (4) Respondent's denial of employment was made in spite of the evidence indicating that he was capable of performing the essential functions of the firefighter position. Respondent on the other hand contends that it is entitled to a summary decision since Complainant's impairment did not qualify as a "handicap" under the provisions of the FEPA, and that the record contains no evidence indicating that it otherwise regarded Complainant as being handicapped. As to Respondent's motion for partial summary judgment, Respondent maintains that the Commission does not have jurisdiction over this matter because Complainant did not file his Charge of Discrimination within 180 days of the date Respondent denied Complainant employment as a firefighter. It similarly submits that this Complaint should be dismissed because: (1) Complainant's federal class action lawsuit under 42 USC §1983 was untimely; and (2) the settlement of Complainant's section 1983 lawsuit, which eventually led to the filing of the instant FEPA action, denied Respondent due process and equal protection under the law. Respondent also urges me to decide the remaining issue not addressed in a prior motion for summary decision concerning whether Complainant was a proper class member of the section 1983 lawsuit.

## Findings of Fact

Based upon the record in the instant matter, I make the following Findings of Fact:

1. On March 7, 1976, Complainant applied for a firefighter position with Respondent. As part of the application process, Complainant was required to perform a physical agility test, a written examination, and an oral examination. Complainant thereafter

passed all three tests, and, on or around July 28, 1976, was placed third on the list of 16 individuals eligible for firefighter vacancies. The physical agility test given to Complainant was not meant to be a simulation of what a firefighter goes through in an actual fire.

2. On August 3, 1976, Complainant was informed that he had been selected to fill a firefighter vacancy and that he was to report for a physical examination.

3. On August 16, 1976, a radiological examination of Complainant revealed the presence of Grade 1 Spondylolisthesis in Complainant's spine. Spondylolisthesis is a condition in which a lower back vertebra slips forward on subjacent vertebra due to defects in the pars interarticularis. The physical condition of an individual with this condition has a bearing on how well the individual can compensate for this defect, and although spondylolisthesis can be aggravated by trauma, some individuals with this condition will lead normal lives and experience no low back pain while others may experience varying degrees of pain and motion limitation. The treatment for spondylolisthesis can range from simple curtailment of physical activity and bed rest to spinal fusion.

4. At all times pertinent to this case, Complainant experienced at most an occasional sensation of a tight belt which may or may not have been due to his spondylolisthesis condition. Complainant has never been temporarily or permanently limited in any manner in the performance of any physical labor or task by this condition.

5. On August 20, 1976, Dr. Cunningham, a physician employed by Respondent, conducted a physical examination of Complainant. At or around the same time, Dr. Cunningham and David Anderson, Respondent's City Manager, had a discussion about the results of Complainant's physical examination and both individuals agreed to send Complainant to another radiology group to obtain oblique views of Complainant's back.

6. On August 26, 1976, the second radiology group confirmed the original diagnosis of the existence of spondylolisthesis.

7. On September 1, 1976, Anderson and Dr. Cunningham met a second time to discuss Complainant's application for the firefighter position. During this conversation, Dr. Cunningham told Anderson that he could not unequivocally say that Complainant could perform all the work that a fireman might be called upon to perform. However, Dr. Cunningham further told Anderson that he believed that because Complainant was qualified to serve (and did serve) in the military, Complainant should have no trouble serving on any fire department. Dr. Cunningham additionally told Anderson that while Complainant was not qualified under Respondent's standards, Complainant would still make an excellent employee because of his motivation and interest in the firefighter position.

8. On September 2, 1976 Anderson drafted a memorandum to Respondent's Board of Fire and Police Commissioners outlining his conversations with Dr. Cunningham. In the memorandum, Anderson included a list of regulations established by the U.S. College of Surgeons to determine whether various back impairments were acceptable for employment, and noted that while Complainants' back impairment on the Surgeons' list would place Complainant in the unacceptable range, the Board's current procedures would permit Dr. Cunningham to use discretion. Anderson also summarized his conversation with Dr. Cunningham by noting that Dr. Cunningham could not unequivocally say that Complainant could perform all of the work that a fireman might be called upon to do, and that Dr. Cunningham indicated that although Complainant was not "qualified by our standards", he still would make "an excellent employee" because of his motivation and interest in the job.

9. On September 2, 1976, the Board of Fire and Police Commissioners met with Anderson where Anderson recommended that the Board not hire Complainant. In making his recommendation, Anderson based his decision on Dr. Cunningham's inability to unequivocally state that Complainant could perform all of the work that a fireman might be called upon to perform. At the time of his decision, Anderson did not perceive Complainant as having a physical impairment that substantially limited his ability to perform a broad class of jobs, that

Complainant was capable of performing an overwhelming majority of jobs that the City had available such as clerical, public works, and administrative positions, but that Complainant was not qualified to perform the job of firefighter for Respondent.

10. On September 3, 1976, the Chairman of the Board of Fire and Police Commissioners wrote Complainant informing him that he had failed the physical examination and was being removed from the eligibility roster. Specifically, the notice informed Complainant that the job offer was withdrawn because the physical examination revealed that Complainant had 20/200 vision in his right eye and had Grade 1 Spondylolisthesis in his spine. (The parties stipulated in a prior federal action that Complainant's eyesight was not a material factor in the decision not to offer him employment as a firefighter, and neither party has raised the issue of Complainant's eyesight in his or its motion for summary decision.)

11. At the time of its decision to deny Complainant employment as a firefighter, the Board had in its possession: (1) Complainant's application; (2) Dr. Cunningham's medical report; (3) the two x-ray examination reports concerning Complainant's back, and (4) Anderson's September 2, 1976 memorandum.

12. Dr. Cunningham's report to the Board advised it that Complainant suffered from a physical impairment known as spondylolisthesis. The report also: (1) failed to recommend Complainant for the firefighter position without reservation; (2) disclosed that Complainant was receiving a ten percent military disability; and (3) reflected a discussion with Complainant that the Veteran's Administration would be responsible for the "congenital defect".

13. At all times pertinent to this case, Complainant's spondylolisthesis has never prevented him from performing any job or task, and Complainant has always been able to perform any physical activity. Moreover, Complainant's spondylolisthesis has never prevented him from communicating or socializing with others, taking care of himself, obtaining transportation or attaining his educational aspirations. Likewise, Complainant's

spondylolisthesis has not interfered with Complainant's ability to work, see, hear, breathe or learn.

14. Upon his rejection from the firefighter position, Complainant immediately obtained full time employment from 1976 to the present, and has worked as a sales engineer, insurance salesman and investigator for the McLean County Coroner's Office. Complainant also owned a sole proprietorship during this time period.

15. At the time of Complainant's rejection for the firefighter position and for a prior period beginning in 1970, Complainant had worked with Respondent's firefighters at certain fires and other incidents as a member of the McLean County Rescue Squad Volunteer. During said incidents, Complainant's duties typically included carrying air tanks back and forth from fireman to filling stations, dragging fire hoses, setting up, running and dismantling remote lighting units, holding fire hoses, carrying stretchers with injured parties and many other assistance type duties. During this time, Complainant trained other Squad Volunteers in these duties and also cross-trained firefighters. During this training Complainant lifted heavy items, as well as climbed, repelled and swam. Complainant also taught continuing education courses through slide show presentations, and for the years 1975 and 1976, Complainant participated in a slow pitch softball team.

16. During a ten-year period (between 1970 and 1980) when Complainant served as a member of the McLean County Emergency Squad, Complainant responded to approximately 50 calls for assistance from Respondent's Fire Department. At all times pertinent to this Complaint, Respondent's Fire Department responded to approximately 600 calls per year.

17. At the time of Complainant's rejection for the firefighter position, a firefighter working for Respondent was required to: (1) wear protective clothing weighing 15 pounds; (2) wear breathing apparatus weighing 30 pounds; (3) carry rolled hose weighing approximately 20 to 100 pounds; (4) carry and set ladders weighing from 25 to 205 pounds; (5) carry stretchers, back boards and victims weighing from 25 to 275 pounds; (6) carry hand equipment such as

saws, axes and power equipment of various weights; (7) wear and utilize a pompier belt; (8) handle hose nozzles and connections weighing from 15 to 35 pounds; (9) lift and pull objects through the use of ropes and pulley systems; (10) “ride the bumps” on the rear apparatus in a standing position rather than a sitting position; (11) crawl, climb and carry objects in awkward and unusual positions; and (12) handle pressurized hose. Moreover, firefighters were required to fight fires at all times of the day from 15 minutes to 5 hours.

18. On October 5, 1976, Complainant visited the offices of the Fair Employment Practices Commission (FEPC) in Springfield, Illinois and prepared a “Complainant Information Sheet”. The information sheet contained the following language:

> “This is NOT a legal charge.” (Emphasis and capitalization in the original.) “The Law requires that a charge be filed within 180 days from the date of the alleged discrimination.” (Emphasis in original.)

Following Complainant’s initial visit to the FEPC, Complainant telephoned the FEPC on several occasions to check of the status of his “charge”. None of the FEPC representatives that Complainant spoke to could clearly identify the status of Complainant’s “charge”. At no time during these subsequent conversations with FEPC representatives was Complainant ever instructed that he needed to do anything in addition to what he had already done to perfect his “charge”. The record is silent as to whether Complainant ever asked a FEPC representative whether he needed to do anything more to perfect his “charge”.

19. On March 29, 1977, Complainant filed the instant perfected Charge of Discrimination with the FEPC, alleging that he had been the victim of handicap discrimination. The record is silent as to the circumstances surrounding Complainant’s signature, or as to the facts leading up to Complainant’s signature on the March 29, 1977 Charge.

20. Nothing happened on the Charge of Discrimination until January of 1979, when an individual at the FEPC informed Complainant's counsel that Complainant's case had been placed on "deferred status", and that he had a right to pursue his cause of action in Circuit Court.

21. On March 28, 1979, Complainant received a notice from Patricia Gallagher of the FEPC, informing him that there remained a real possibility that the FEPC would dismiss his charge due to a recent Illinois Supreme Court case which held that the FEPC must investigate all charges within 180 days after filing said charges or lose jurisdiction to do so. The notice, though, further informed Complainant of a new law, which would permit individuals to file charges directly in Circuit Court, rather than through the FEPC. The notice also indicated that Complainant would be receiving another notice, which would begin the two-year limitation period for filing of a cause of action in Circuit Court.

22. On April 11, 1979, Complainant's counsel wrote the FEPC and stated that "my client has elected to pursue his charge in the Circuit Court or, alternatively, in Federal District Court if pendent jurisdiction can be established."

23. Thereafter in April of 1979, Complainant filed a federal handicap discrimination action under Section 504 of the Rehabilitation Act (29 USC §794), as well as two §1983 claims against Respondent asserting that Respondent had violated his due process and equal protection rights. The allegations in all counts of the federal lawsuit were essentially the same as made in the instant case, i.e., that Respondent denied Complainant employment as a firefighter after discovering that Complainant had a disorder to his back known as spondylolisthesis, and that his back impairment was unrelated to his ability to perform the firefighter position. As to all counts of the federal lawsuit, Complainant sought instatement to a firefighter position, backpay with interest, punitive damages, costs and attorney fees, and any "other and further relief as the Court deems necessary".

24. On May 3, 1979, the FEPC sent to Complainant a notice informing him that he had two years to file any state discrimination action directly with the Circuit Court.

25. On July 1, 1980, all charges pending before the FEPC were transferred to the Department of Human Rights.

26. In the meantime, Respondent filed a motion for summary judgment as to all counts alleged in the federal lawsuit.

27. On September 17, 1980, the Federal District Court, in finding that Respondent did not violate any federal law or provision of the U.S. Constitution in its denial of employment, granted Respondent's motion for summary judgment as to all three federal claims and declined to exercise any pendent jurisdiction as to any of the state claims including Complainant's state handicap discrimination claim.

28. As to Complainant's equal protection claim, the court rejected Complainant's contention that Respondent's denial of employment based upon his back impairment constituted an arbitrary classification without a rational basis. Specifically, the court held that Respondent's determination not to hire Complainant based upon a lower back impairment was rationally related to a legitimate interest of Respondent due to the nature of the firefighter's job which would "necessarily" put stress on Complainant's back. Moreover, the court found that, as least for purposes of satisfying the Equal Protection Clause of the U.S. Constitution, Respondent could properly require that its firefighter applicants be free from serious back impairments.

29. On September 24, 1980, the Department of Human Rights notified Complainant that his charge was being administratively closed. The basis for this notice was the fact the Illinois Supreme Court, in **Board of Governors v. F.E.P.C. et al.**, 78 Ill.2d 143 (1979), determined that a charge that had not been completely investigated by the F.E.P.C. within 180 days was required to be dismissed. The record is silent as to whether the Department was ever aware of Complainant's federal lawsuit or the September 17, 1980 summary judgment ruling, or that Complainant had filed either a federal or state claim alleging discrimination based upon Complainant's handicap.

30. On May 5, 1981, Complainant filed in Circuit Court a lawsuit raising, *inter alia*, the state law discrimination claims that were not ruled upon by the federal court. Subsequent to this filing, the Illinois Supreme Court, in **Wilson v. All-Steel, Inc.**, 87 Ill.2d 28 (1981), found

unconstitutional the statute granting Complainant the right to sue Respondent in Circuit Court for his state claim of handicap discrimination, and Complainant, on December 16, 1981, voluntarily dismissed the Circuit Court case based upon the Illinois Supreme Court's decision in **Wilson**.

31. In 1982, the United States Supreme Court, in **Logan v. Zimmerman**, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), reversed an Illinois Supreme Court ruling and ultimately held that the failure of the FEPC to process a discrimination claim solely because the Commission had failed to act on the claim within the time frame provided by law deprived claimants of due process of law.

32. Nothing with respect to Complainant's handicap claim against Respondent happened until January 23, 1983, when a class of persons who, like Complainant, had their charges administratively closed due to a lack of a timely investigation by the FEPC, filed a federal class action lawsuit against the Director of the Department of Human Rights. (See, **Bennett v. Bombela**, 634 F.Supp. 355 (N.D.Ill. 1986).) The class action sought an injunction directing the Department to reopen the charges that had been administratively closed. On May 8, 1986, the District Court granted the Department's motion for summary judgment on the grounds that the claim of one of the named plaintiff class representative was barred by laches, and the discrimination claim of the other named class representative had not been filed in a timely manner as required under state law.

33. On appeal, the Seventh Circuit reversed the District Court's holding in **Bennett**, finding that the doctrine of laches did not apply to the 28-month delay at issue because 17 months of the delay was attributable to the pendency of the **Logan** case, and because there was insufficient evidence to establish that the other claim of discrimination was untimely. (**Bennett v. Bombela**, 827 F.2d 63, 69 (7th Cir. 1987).)

34. Upon remand from the Seventh Circuit opinion in **Bennett**, the District Court in 1989, certified the class of plaintiffs to be covered under the opinion. At that time the District

Court indicated that the plaintiff class would consist of all claimants who had filed charges with the FEPC before September 16, 1978 and whose cases had been administratively closed by the FEPC for failure to issue a complaint or dismiss a charge within 180 days, with the exception of those individuals who subsequently had their cases reopened by the FEPC and their charges processed.

35. Upon a second appeal of the **Bennett** case to the Seventh Circuit, the Seventh Circuit found that the **Bennett** class established a violation of their constitutional rights by the FEPC and the Department, and directed the District Court to fashion a remedy for the class members. (**Bennett v. Jett**, 966 F.2d 207 (7th Cir. 1992).) The Seventh Circuit, however, observed that a class member would not be entitled to a hearing on his or her state discrimination claim if the action were "barred by procedural requirements or *res judicata*". **Bennett**, 966 F.2d at 208.

36. At some point during the **Bennett** litigation, certain employers who were charged as respondents before the FEPC attempted to intervene in the litigation. While the record is unclear as to what happened with the motion to intervene (which was opposed by the class representatives of the individual claimants), the record is clear that the instant Respondent was not a party to the **Bennett** litigation prior to this stage of the proceedings.

37. On April 4, 1993, the District Court signed a settlement agreement which gave each **Bennett** class member an option to either release his or her claim for $350.00 or have the claim reopened and investigated by the Department. (The terms of the settlement agreement, though, differed somewhat from the terms of the 1989 certification order since the terms of agreement limited the class members to those "whose charge was closed before the investigation was completed and was not settled or pursued in state court.")

38. On July 27, 1993, the Department, pursuant to the terms of the settlement agreement, sent out a document entitled "Bennett Settlement Claim Form" to potential class members. The form specifically asked each individual if they "pursued a charge in state court".

The form, however, did not specifically ask whether any discrimination claim had been pursued in federal court.

39. Complainant apparently signed the form on December 3, 1993, and the Department thereafter determined that Complainant was an appropriate class member and was eligible to participate in the settlement agreement.

40. Thereafter, the Department investigated Complainant's allegations of discrimination, and filed on July 7, 1995, a Complaint with the Commission on behalf of Complainant, alleging handicap discrimination under the Fair Employment Practices Act (Ill. Rev. Stat. 1975, Ch. 48, pars 851 et al.).

41. On August 8, 1995, prior to the due date for filing a verified answer to the instant Complaint, Respondent filed with the Commission a motion for stay of proceedings, based upon the existence of a circuit court action filed by Respondent against the Commission, the Department and the Complainant. The motion for stay of proceedings was granted. In the circuit court action, Respondent generally raised issues with respect to whether Complainant was a proper member of the **Bennett** class, and whether this case was barred by notions of either *res judicata* and/or collateral estoppel based upon the prior federal action.

42. Before the Circuit Court could issue a ruling on the Respondent's lawsuit, Complainant filed a motion in the Federal District Court for class status determination in the **Bennett** case. Respondent filed a responsive pleading to this motion.

43. On December 28, 1996, Judge Norgle from the Federal District Court entered an order granting Complainant's motion for class status. Specifically, Judge Norgle found that under the terms of the settlement agreement, only the Department of Human Rights had the power to determine whether Complainant was a member of the **Bennett** class. Moreover, according to Judge Norgle, because the Department had originally determined that Complainant was within the **Bennett** class, no "ALJ [including the Commission's Judge Gunnarsson, who in the related case of **Bailey and United Parcel Service**, ALS No. 9334 (August 15, 1996)

determined that Bailey was not a proper member of the **Bennett** class], U.S. District Judge, or state judge...[could supplant] the determinations" of class eligibility made by the Department. Judge Norgle further found that while the settlement agreement order may have contained language that could have precluded potential members who had filed discrimination claims in forums other than "state court", the language of the original certification order did not contain such language, and thus Complainant could pursue his Charge filed with the Department.

44. On April 16, 1997, the Circuit Court entered an order that essentially dismissed Respondent's complaint against the Commission, the Department and the Complainant. Specifically, the court, while disagreeing with Judge Norgle's holding that the Department had essentially unreviewable power to determine members of the **Bennett** class, ultimately deferred to Judge Norgle's decision, after finding that Respondent's only recourse was to appeal Judge Norgle's ruling to the Seventh Circuit. Respondent thereafter filed an appeal to the Appellate Court with respect to the Circuit Court's ruling. On August 13, 1997, the Appellate Court proceeding was stayed pending the outcome of the instant matter, and the stay previously entered in the instant case was lifted.

## Conclusions of Law

1. Complainant is an aggrieved person as that term is defined under section 853 of the Fair Employment Practices Act (Ill. Rev. Stat. (1975), Ch. 68, par. 853).

2. Respondent is a proper “employer” as that term is defined under section 852(d)(ii) of the Fair Employment Practices Act (Ill. Rev. Stat. (1975), Ch. 68, par. 852(d)(ii)).

3. Under section 8(a) of the Fair Employment Practices Act (Ill. Rev. Stat. (1975), Ch. 68, par. 858(a)), an individual has 180 days from the date of the adverse act in which to file a written Charge of Discrimination under oath. Moreover, the 180-day charge-filing limitation period is an inherent part of the employment discrimination action created by the Fair Employment Practices Act (FEPA).

4. Concepts of equitable estoppel, tolling and waiver usually apply only to statute of limitation periods that are not inherent elements of the cause of action.

5. The provisions of the FEPA, as opposed to the provisions of the Human Rights Act, apply to this proceeding since the provisions of the FEPA were in effect at the time Respondent denied Complainant employment as a firefighter.

6. Section 3(a) of the Fair Employment Practices Act (Ill. Rev. Stat. (1975), Ch. 68, par. 853(a)) prohibits employers from refusing to hire a person having any physical or mental impairment which constitutes or is regarded as constituting a substantial limitation to one or more of a person's major life activities.

7. Complainant has failed to establish, as a prima facie matter, that he had a handicapped condition covered under the FEPA.

8. Complainant failed to present any evidence that Respondent regarded him as having a handicapped condition under the FEPA.

9. The fact that Respondent denied Complainant employment as a firefighter as a result of his back impairment, standing alone, is insufficient as a matter of law to establish that Respondent perceived Complainant to have had a handicapped condition under the FEPA.

## Determination

Complainant's motion for summary decision should be denied because the record contains the existence of a material fact as to whether he could have performed the essential duties of a firefighter position. Respondent's motion for summary decision should be granted because Complainant failed to present sufficient evidence to establish a *prima facie* case of handicap discrimination under the FEPA.

## Discussion

### Preliminary Matters.

Before proceeding on the merits of motions for summary decision, Respondent has raised certain issues pertaining to the jurisdiction of the Commission to decide Complainant's

handicap claim. Specifically, Respondent maintains that this Commission is without jurisdiction to resolve this Complaint since Complainant waited 209 days in which to file his sworn Charge of Discrimination with the FEPC, which was beyond the 180-day limitation period for filing charges of discrimination under the FEPA. Respondent also maintains that the Complaint should be dismissed because: (1) Complainant's federal class action lawsuit under 42 USC §1983 (i.e. the **Bennett** lawsuit) was untimely; and (2) the settlement of the **Bennett** lawsuit, which essentially revived Complainant's Charge of Discrimination after it had been administratively closed, essentially denied Respondent's rights under the Due Process and Equal Protection Clauses of the U.S. Constitution. However, none of Respondent's arguments in this regard require dismissal of this Complaint under the state of this record.

The heart of Respondent's contention with respect to the timeliness of the instant Complaint lies with the Appellate Court's decision in **Larrance v. Illinois Human Rights Commission**, 166 Ill.App.3d 224, 519 N.E.2d 1203, 117 Ill.Dec. 36 (4th Dist. 1988), and **Phelps v. Illinois Human Rights Commission**, 185 Ill.App.3d 96, 540 N.E.2d 1147, 133 Ill.Dec. 281 (4th Dist. 1989). In **Larrance**, the Commission dismissed a complaint filed under the FEPA where the complainant had filled out a "Complainant Information Sheet" (CIS) within the applicable 180-day period after he had been told of his termination, but had not filed a sworn, charge of discrimination until after the 180-day period had expired. In affirming the dismissal on jurisdictional grounds, the **Larrance** court emphasized that the 180-day charge-filing limitation period was an inherent part of the cause of action, and that limitations periods which are an inherent part of the cause of action are not generally susceptible to concepts of equitable estoppel, tolling and waiver.

Complainant, though, notes that under **Gonzales v. Illinois Human Rights Commission**, 179 Ill.App.3d 362, 534 N.E.2d 544, 128 Ill.Dec. 362 (1st Dist., 4th Div. 1989) a charge of discrimination filed with the Department of Human Rights need not be verified prior to the expiration of the 180-day time period in order for the Commission to obtain jurisdiction, and

urges the Commission to use these same equitable principles to find that it has jurisdiction over the this matter. Specifically, he asserts that he first went to the FEPC in October of 1997, well within the applicable 180-day limitations period, and that the FEPC never informed him that he needed to do something more to perfect his claim, even though he made numerous inquiries concerning the status of his case.

In its response, Respondent maintains that **Gonzales** is distinguishable because it concerned a different CIS form than the CIS form used by the FEPC in the this matter. Moreover, it submits that unlike the form used by the Human Rights Commission in **Gonzales**, the CIS form used by the FEPC clearly tells complainants that charges under the FEPC were not automatically accepted, and that the CIS form was not the equivalent of a legal charge. Thus, Respondent asserts that because the instant CIS form also reminded Complainant that he had to file a charge within 180 days from the date of the alleged discriminatory act, the record contradicts the Complainant's contention that the FEPC never informed him that he had to file a sworn charge of discrimination within a certain time period.

In reviewing the record, I agree that Respondent has raised some valid concerns about the timeliness of the instant Charge of Discrimination, especially since the instant CIS form expressly told Complainant that the form did not constitute a legal charge. (See, also **Phelps v. Illinois Human Rights Commission**, 185 Ill.App.3d 96, 540 N.E.2d 1147, 133 Ill.Dec. 281 (4th Dist. 1989), which suggests that result in **Gonzales** would not apply to FEPC charges since the forms used by the FEPC did not mislead complainants into believing that the CIS form was in fact a charge of discrimination.) Indeed, Complainant's affidavit never indicates that he specifically asked FEPC personnel if he needed to do anything to perfect his "charge", or that FEPC personnel misled him as to the status of his "charge", something that at least the **Larrance** court requires in order to apply the doctrine of equitable tolling. **Larrance**, 519 N.E.2d at 1209.

The facts in **Larrance**, though, also indicated that the intake officer examined the CIS form and informed the complainant prior to the expiration of the 180-day limitations period that his charge would not be accepted and that no charge would be filed. In contrast, Complainant alleges in his affidavit that no one at the FEPC could clearly identify the status of his "charge".[1] Moreover, the record is silent as to what led Complainant to actually file a sworn Charge of Discrimination in March of 1977. Thus, in view of the uncertainty as to what was actually told to Complainant during his inquiries to the FEPC, as well as the suggestion in **Larrance** that the applicable rules would have permitted the FEPC to have accepted a written charge even though it lacked an element necessary for a perfected charge, I will deny without prejudice this aspect of Respondent's motion for partial summary decision and permit Respondent to raise the issue again at the public hearing if such a hearing should become a necessity.

Respondent alternatively asserts that the instant Complaint should be dismissed because Complainant's federal class action lawsuit in **Bennett** that resurrected Complainant's action before the Human Rights Commission was filed beyond the applicable two-year limitation period set forth under 42 USC §1983. Specifically, Respondent maintains that the two year period began on September 1, 1980, when the Department administratively closed Complainant's pending charge, because the Illinois Supreme Court, in **Springfield-Sangamon County Regional Plan Commission v. The Fair Employment Practices Commission**, 71 Ill.2d 61, 373 N.E.2d 1307, 15 Ill.Dec. 623 (1978), had previously determined that charges pending in the FEPC for longer than 180 days were time barred.

Complainant does not essentially quarrel with Respondent's contention that he was subject to a two-year period limitation period for filing a §1983 claim. Complainant, though, argues that the limitation period began on November 13, 1981, when the Illinois Supreme Court

[1] If Complainant's allegations are literally true, it may be difficult to show how he was misled about the necessity of filing his sworn Charge of Discrimination within a certain time period if various individuals at the FEPC were essentially telling him "I don't know" when questioned about the status of Complainant's "charge".

in **Wilson v. All-Steel, Inc.**, 87 Ill.2d 28, 428 N.E.2d 489, 56 Ill.Dec. 897 (1981) held unconstitutional a statute creating a cause of action for individuals whose claims had been closed by the FEPC as being time-barred because of administrative delay. This is so, Complainant insists, because: (1) in relying on the **Springfield-Sangamon County Regional Plan Commission** case, he initiated a circuit court action in an attempt to revive his FEPC claim; (2) he only voluntarily dismissed the circuit court action after learning of the **Wilson** case; (3) it was not until the statute upon which the circuit court's jurisdiction was dependent was rendered unconstitutional that he had any reasonable need to pursue a claim under 42 USC §1983; and (4) the **Bennett** lawsuit was filed within two years of the **Wilson** decision.

However, Respondent contends that Complainant's reticence in filing a federal lawsuit until the November 13, 1981 decision in **Wilson** had been issued is belied by the fact that Complainant filed in July of 1979 his own federal court lawsuit challenging Respondent's decision to deny him employment as a firefighter. It similarly notes that the complainant in **Logan v. Zimmerman**, 455 U.S. 422 (1982) had a charge administratively dismissed by the FEPC on September 1, 1980, and yet was able to file a federal action within the two-year limitation period to vindicate his claim. Thus, it submits that Complainant could have and should have filed his lawsuit within the two years of the September 1, 1980 dismissal of his charge.

Respondent's argument, though, ignores the fact that Complainant held a reasonable expectation that his FEPC claim would be resolved through the circuit court action until November of 1981 when the **Wilson** court rendered its decision which essentially took away Complainant's cause of action. Moreover, while it is true that Complainant filed a related federal action, the initial Order and Decision entered in this action made clear that the federal court ruling on Complainant's federal Constitutional rights did not implicate any of the questions at issue concerning the propriety of the FEPC administratively dismissing Complainant's Charge of Discrimination due to its own delay. (Order and Decision, slip op. at p. 15.) Thus, because I find that Complainant could not have been expected to initiate a federal lawsuit to protect his

FEPC cause of action until the Illinois Supreme Court rendered its decision in **Wilson**, I will deny this aspect of Respondent's motion for partial summary decision, assuming that Respondent has standing to raise a §1983 statute of limitations issue in this proceeding.

On a related issue, Respondent asserts that the instant Complaint must be dismissed since the settlement that resulted from the **Bennett** litigation effectively denied it due process and equal protection. This is so, Respondent contends, since: (1) the Department of Human Rights entered into a settlement of the **Bennett** case which resulted in the reviving of Complainant's FEPC cause of action; (2) the settlement was effectuated without the consent of Respondent or any other employer; and (3) under **Local No. 93, International Association of Firefighters v. City of Cleveland**, 478 U.S. 501 (1986), parties to a settlement agreement cannot bind and impose obligations on persons who are strangers to the proceedings even if the strangers have actual knowledge of the lawsuit or the settlement. Respondent additionally maintains that it was prejudiced by the settlement since it prevented Respondent from presenting to the federal court issues with respect to the appropriateness of Complainant's membership into the **Bennett** class action, as well as issues regarding the doctrine of laches and Complainant's failure to join Respondent in the **Bennett** lawsuit.

However, I agree with Complainant's argument that there could be no due process or equal protection violation here since the **Bennett** lawsuit did nothing more than implement what had previously been mandated by the United States Supreme Court in **Logan**. Moreover, some of the alleged harms mentioned by Respondent have not materialized since: (1) Respondent was able to proffer arguments with respect to laches and *res judicata* which the Commission has already resolved in the initial Order and Decision; and (2) Respondent actually litigated the issue of Complainant's inclusion in the **Bennett** class in front of Judge Norgle in 1996. Accordingly, this aspect of Respondent's motion for partial summary decision will be denied.

Alternatively, Respondent contends that dismissal of this Complaint is required since Complainant was not a proper member of the **Bennett** class. This is so, Respondent contends,

because: (1) the terms of the **Bennett** settlement defined class membership as those individuals whose cases were administratively closed by the FEPC and who had not either settled or pursued their claims in state court; and (2) Complainant "pursued" his FEPC claim by filing his circuit court action that was ultimately dismissed after **Wilson**, as well as the federal court lawsuit seeking recovery under section 504 of the Rehabilitation Act and section 1983. However, it is difficult to find that Complainant "pursued" his state and federal claim where there was no determination on the merits of either the Rehabilitation Act claim, and where Complainant voluntarily withdrew his circuit court case pursuant to the **Wilson** ruling. Moreover, I would note that Respondent already had an opportunity to appeal Judge Norgle's order of December 28, 1996, which essentially determined that Complainant's inclusion within the **Bennett** class could not be challenged. Accordingly, this aspect of Respondent's motion for partial summary decision will be denied as well.

**The Merits**.

As with all motions for summary decision pending before the Commission, a motion for summary decision shall be granted if the record indicates that there is no genuine issue as to any material fact, and the moving party is entitled to a recommended order as a matter of law. (See, 8-106.1 of the Human Rights Act (775 ILCS 5/8-106.1), and **Bolias and Millard Maintenance Service Company**, 41 Ill. HRC Rep. 3 (1988).) Moreover, in analyzing motions for summary decision, the Commission is required to scrutinize the pleadings, affidavits and exhibits presented to it and to strictly construe them against the party seeking the summary decision so as to leave no doubt but that summary decision is proper. (See, **Fourdyce v. Bay View Fish Co.**, 111 Ill.App.3d 76, 443 N.E.2d 790, 66 Ill.Dec. 864, 866 (3rd Dist. 1982).) Furthermore, although there is no requirement that a party establish his or its own case to overcome the motion, a party is still required to present some factual basis that would arguably entitle him or it to a judgment under the applicable law. (See, **Schoondyke v. Heil, Heil, Smart & Golee**, 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist., 2nd Div. 1980).) Finally,

the overall purpose of a summary decision is not to be a substitute for a trial, but rather to determine whether a triable issue of fact exists. See, **Glen View Club v. Becker**, 113 Ill.App. 2d, 251 N.E.2d 778 (1st Dist., 2nd Div. 1969).

Before addressing the merits of both motions for summary decision on the issue of liability, it is necessary to resolve the appropriate statute upon which Complainant's discrimination case is based. Specifically, the instant Complaint equates a handicap claim under the FEPA with the handicap provisions of the Human Rights Act, and Complainant asserts throughout his motion for summary decision that he is entitled to a judgment under the Human Rights Act. However, as noted by Respondent, the Human Rights Act was not in existence at the time of Complainant's denial of employment in 1976, when Respondent and other employers were operating under the handicap provisions of the FEPA. Accordingly, even though the instant Complaint was not filed until 1995, I agree with Respondent that the standards under the FEPA apply to this matter since courts have traditionally enforced the statute as it existed at the time of the alleged injury. See, for example, **Grigsby v. Industrial Commission**, 76 Ill.2d 528, 394 N.E.2d 1173, 31 Ill.Dec. 796 (1979), and **Caterpillar, Inc. v. Human Rights Commission**, 154 Ill.App.3d 424, 506 N.E.2d 1029, 107 Ill.Dec. 138 (3rd Dist. 1987).

As it turns out, the difference between the handicap provisions of the Human Rights Act and the FEPA are quite significant. Specifically, the handicap provisions under the FEPA provide that it is an unlawful employment practice for an employer to refuse to hire an individual because of such individual's "physical or mental handicap unrelated to ability of [such] an individual". The FEPA did not define what the term handicap meant, and on October 13, 1976, (approximately one month after Complainant was denied employment as a firefighter) the FEPC adopted guidelines which defined a physical or mental handicap as:

> "any physical or mental impairment resulting from or manifested by anatomical, physical, neurological or psychological conditions, demonstrable by medically accepted clinical or

> laboratory diagnostic techniques, and which constitutes or is regarded as constituting a substantial limitation to one or more of a person's major life activities."

Moreover, because the FEPC guidelines pertaining to "substantial impairments" were nearly identical to guidelines developed under the federal Rehabilitation Act and Americans with Disabilities Act (ADA), Illinois courts, as well as the Commission and both parties to this litigation, have looked to federal court opinions when interpreting the FEPC guidelines. (See, **Lyons v. Heritage House Restaurants**, 82 Ill.2d 163, 432 N.E.2d 270, 59 Ill.Dec. 686 (1982), and **Darfler and City of Aurora**, 4 Ill. HRC Rep. 42, 48 (1982).) Thus, it is under these standards that both motions for summary decision will be evaluated.

According to Complainant, he qualified for protection under the handicap provisions of the FEPA because his spondylolisthesis pertained to an anomaly of joints in his back similar to that which the Commission recognized as a qualifying condition in **Haas and Texaco, Inc.**, 19 Ill. HRC Rep. 320 (1985). Moreover, Complainant maintains that: (1) Respondent, in rejecting him for the firefighter position, relied in part on an arbitrary classification of physical conditions; (2) Respondent's decision to deny him the firefighter position was made without undergoing an individualized assessment of his ability to perform the essential functions of the job of firefighter; and (3) his passing of the physical agility test, as well as his prior history of service as a volunteer rescue squad member, adequately demonstrates that he could have physically performed the functions of the firefighter position. Complainant's arguments in this regard, however, are not persuasive.

Initially, as will be discussed in Respondent's motion for summary decision, I agree with Respondent that Complainant did not have a qualifying condition under the FEPA since he was unable to present any evidence that he was substantially limited in a major life activity or was perceived as such by Respondent. Alternatively, I find that there is at least a triable issue with respect to whether Complainant's spondylolisthesis is unrelated to his ability to do firefighter work. Specifically, the record contains evidence that Respondent's firefighters must fight fires

ranging from fifteen minutes to five hours in duration at anytime of the day and under any weather conditions. While Complainant's duties with the volunteer rescue squad dovetailed somewhat the duties of Respondent's firefighters, the record is unclear whether Complainant's supportive role in assisting Respondent's firefighters clearly demonstrated that Complainant could have performed all of the essential duties of the position. Too, I would note that the list of activities for the subject firefighter position contained specific activities (i.e., wearing protective clothing and apparatus for extended periods of time and carrying and using various firefighter equipment in unusual or awkward positions) which had no apparent equivalence to Complainant's volunteer rescue duties.

True enough, Complainant's proffered the opinion of Dr. Cunningham who ultimately recommended Complainant for employment as one of Respondent's firefighters. A close reading of Dr. Cunningham's recommendation, though, does not leave me at this juncture with a certainty that Complainant could have performed the essential duties of the firefighter position. Specifically, Dr. Cunningham based his recommendation on the fact that Complainant had previously qualified for (and served in) the military service. Yet there is nothing in the record to determine whether Dr. Cunningham particularly knew what Complainant had done in the military or how Complainant's military duties translated to firefighter duties. Moreover, Cunningham's recommendation was somewhat ambiguous where he also conceded to Respondent's City Manager (Anderson) that he could not say that Complainant would be able to do all of the work that a firefighter might be called upon to do. Accordingly, where there is a question as to whether Complainant could have performed all of the essential duties of the firefighter position, I find that Complainant's motion for summary decision can be denied on this separate basis as well.

Respondent's motion for summary decision centers on its contention that Complainant did not have a qualifying impairment to be covered under the handicap provisions of the FEPA. Specifically, Respondent focuses on the requirement that Complainant's impairment be

sufficiently severe so as to constitute a substantial limitation on one or more major life activities and notes that Complainant conceded in his deposition that his spondylolisthesis has never limited him from communicating, socializing, taking care of himself or obtaining transportation or educational opportunities. Similarly, Respondent asserts that Complainant admitted during his deposition that his spondylolisthesis has not interfered with his ability to see, walk, speak, breathe or learn, and that his condition did not prevent him from performing any job, task or physical activity. Finally, Respondent maintains that Complainant could never establish that his spondylolisthesis substantially limited his ability to work since: (1) because not everyone can be a firefighter, an individual denied a firefighter position must show that he or she was unable to work in a broad class of jobs (see, **Leisen v. City of Shelbyville**, 153 F.3d 805, 808 (7th Cir. 1998), and **Sutton v. United Air Lines, Inc.**, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)); and (2) Complainant's deposition testimony and his extensive employment history in the rescue and other fields demonstrate that his spondylolisthesis has not inhibited his ability to work or obtain employment in any fashion. See also, **Patterson v. Chicago Association for Retarded Citizens**, 150 F.3d 719 (7th Cir. 1998), and **Sinkler v. Midwest Property Management Limited Partnership**, 209 F.3d 678, 683 for the related proposition that if an employee's impairment does not rise to the level of a disability as defined under the ADA, he or she cannot recover even if the employer denied him or her employment because of the impairment.

Complainant has not seriously challenged Respondent's contention that he did not have a qualifying condition under the FEPA. Specifically, while Complainant describes his spondylolisthesis condition as a "congenital defect", his deposition testimony clearly indicates that, outside of a tightness in his belt region that may or may not be related to his spondylolisthesis, his impairment did not actually affect him in any of the major life activity areas mentioned by the FEPC or ADA guidelines. Moreover, Complainant's citation to **Haas** for the apparent purpose of showing that an employee's back problems can form the basis of an action

under the FEPA is not especially helpful here, since, unlike Complainant's back impairment, the facts in **Haas** (i.e., back injury causing severe bouts of pain requiring surgery to correct) indicated the existence of a prior condition that was serious enough at one time to have constituted a substantial limitation of a major life activity. Thus, for all of the above reasons, I find that a summary decision in Respondent's favor is appropriate to the extent that Complainant bases his handicap claim on allegations that he had an actual handicap under the FEPA at the time that Respondent denied him employment as a firefighter. In short, Complainant's back impairment was not sufficiently severe to have qualified for coverage under the FEPA.

The inquiry, though, does not stop here since Complainant makes further allegations in his own motion for summary decision and in his response to Respondent's motion for summary decision that, even if he did not have a qualifying impairment, Respondent's decision-makers "regarded him" as being sufficiently disabled under the FEPA when it denied him employment as a firefighter. Indeed, Complainant's argument in this regard is nothing more than a restatement of the FEPC guidelines that recognize a cause of action for "regarded as" claims as a separate theory of handicap discrimination. Moreover, Complainant has filed a motion to amend his Complaint in order to add a perceived handicap theory to his discrimination claim.

Respondent initially urges me to deny Complainant's motion to amend his Complaint since Complainant failed to comply with the "good cause" requirement for amended complaints contained in section 5300.650 of the Commission's Procedural Rules (56 Ill. Admin. Code, Ch. XI, §5300.650). Specifically, Respondent maintains that Complainant has not offered any explanation as to why he waited almost five years to amend his Complaint, and notes that his motion comes after all of the briefing had taken place on the various motions for summary decision and after the record established that Complainant could never win on a claim that he had an actual qualifying impairment. Indeed, Complainant has not offered any explanation as to what he learned from discovery that led him to believe that he had a viable perceived handicap

claim. Respondent also suggests that an amendment at this time would be prejudicial to it since: (1) Complainant had steadfastly contended from the inception of this case and throughout discovery that he had an actual, qualifying impairment under the FEPA; and (2) Complainant did not allege any facts in the Charge of Discrimination or the Complaint that would have given it notice that he was asserting an alternative "regarded as" theory with respect to his handicap claim.

While the lack of an explanation for the timing of Complainant's motion to amend his Complaint is troubling, I would note that Respondent was able to anticipate Complainant's perceived handicap theory in its motion for summary decision and submit evidentiary affidavits addressing that issue. One of the problems, though, with Complainant's motion is that he failed to identify in his proposed amended Complaint the relevant major life activity that Respondent perceived him to have had a substantial limitation. Moreover, this analysis is made somewhat more complicated because Complainant initially asserted in his motion for summary judgment that Respondent perceived his back impairment as a substantial limitation on the major life activity of working, but then shifted gears in his response to Respondent's motion for summary decision and contended that Respondent perceived his back impairment as a substantial limitation on the major life activity of performing manual labor. Under these circumstances, I would normally deny Complainant's motion for failure to satisfy the "good cause" prong of section 5300.650. However, because neither of Complainant's contentions has any evidentiary support in this record, I will grant Complainant's motion to amend his Complaint in order to complete the discussion on Complainant's handicap claim.

As noted by Complainant, the Interpretive Guidelines of the ADA provide that an individual who has an impairment that does not in fact substantially limit a major life activity can still be considered "regarded as" disabled if the individual can show that the employer made an employment decision because of a perception of a disability based on "myth, fear or stereotype." (See, 29 CFR Pt. 1630, App. §1630.2(l).) With respect to the major life activity of

working, case law requires that Complainant be able to show not only that Respondent's management knew of his back impairment, but also that Respondent's management believed that Complainant was substantially limited because of it. (See, for example, **Moore v. J.B. Hunt Transport, Inc.**, 221 F.3d 944, 954 (7th Cir. 2000).) Hence, for the major life activity of working, Complainant must present some evidence that Respondent's management believed that his back impairment precluded him from a broad class or range of jobs. See, for example, **Skorup v. Modern Door Corporation**, 153 F.3d 512, 515 (7th Cir. 1998).

Here, though, Complainant provides no evidentiary facts to support his contention that Respondent believed that he could not perform a broad range of jobs. Moreover, Respondent has provided Anderson's affidavit indicating that he believed during the relevant time period that, although Complainant was not qualified for the firefighter position, Complainant could nevertheless perform an overwhelming majority of jobs offered by Respondent. For purposes of surviving a motion for summary decision, though, it is not enough in a perceived handicap claim to merely establish that an employer believes that a person is unable to perform a particular job. (See, **Murphy**. ) As such, and in view of Anderson's uncontested affidavit, as well as Complainant's failure to present any evidence that Respondent's management believed that Complainant could not perform a broad class of jobs, I find that that Respondent is entitled to a summary decision on Complainant's perceived handicap claim as to the major life activity of working.

The same result obtains even if I could consider Complainant's belated assertion that Respondent regarded him as handicapped as to the major life activity of performing manual tasks. Significantly, Complainant conceded in his deposition that he had no evidence to support his contention that Respondent believed that he was disabled, and offered nothing to counter the contention made by the City Manager that he did not regard Complainant as being substantially limited in other major life activities such as walking, breathing and seeing. Similarly, I am puzzled as to why Complainant would select performing manual tasks as the

applicable major life activity, especially where: (1) according to Complainant, he had at the time of his application an approximate six year history as a volunteer rescue member of providing supportive services to Respondent's Fire Department; (2) many of these services involved manual labor tasks; and (3) Respondent actually passed him on its physical agility tests for the firefighter position. In short, this record suggests, if anything, that Respondent's management actually believed that Complainant could perform manual tasks.

Complainant, though, points to Respondent's September 3, 1976 letter, as well as Anderson's affidavit, as factors supporting his perceived handicap claim because neither document identified with any specificity why his spondylolisthesis rendered him ill qualified to serve as one of Respondent's firefighters. Moreover, Complainant points to the fact that Anderson attached the Surgeon's list of back impairments to his memorandum to the Board as evidence that Respondent did not make an individualized assessment of his ability to do the firefighter job. As such, Complainant submits that it can only be inferred that Respondent either perceived him to be unable to perform certain manual tasks because of his back impairment or held an unsubstantiated concern that the rigorous physical activity required of a firefighter could cause him to suffer some serious back problems in the future. In either circumstance, Complainant contends that Respondent's perception is exactly the sort of "myth, fear or stereotype" conduct that violates the applicable standards set forth in the ADA and EEOC Guidelines.

However, without any evidence to support his contention that Respondent's management believed that he had a substantial limitation as to the major life activities of working or performing manual labor, Complainant has done nothing more than assume a perception of disability on the part of Respondent based only on the fact that Respondent failed to award him the firefighter position. (See, for example, **Moore v. J.B. Hunt Transport, Inc.**, 221 F.3d 944, 954 (7th Cir. 2000).) Unfortunately, this "silence" on the part of Respondent cannot be viewed, by itself, as evidence of any discriminatory intent since employers are free

under FEPA standards to decide that some limiting, but not substantially limiting, impairment make individuals less than ideally suited for a particular job. (See **Murphy** and **Moore** 221 F.3d at 954.) Moreover, Complainant's physical examination by Dr. Cunningham, as well as Cunningham's subsequent ambiguous observation as to whether Complainant had the ability to perform all of the functions of a firefighter, negate any bare assertion by Complainant that Respondent failed to make an individualized assessment of his abilities prior to denying him employment as a firefighter.

True enough, Respondent did not specify in its September 3, 1976 letter why Complainant's spondylolisthesis rendered him ill qualified for the subject firefighter position. But if, as Complainant suggests, this silence has evidentiary value as to issues with respect to Respondent's perception that he was substantially limited in the major life activities of working and performing manual tasks, it was Complainant's obligation to uncover such evidence during discovery and submit it with his response to Respondent's motion for summary decision. Here, though, Complainant has done nothing more than point to the bare allegations of perceived handicap in his amended Complaint to stave off Respondent's motion for summary decision, something that the Appellate Court has recognized is fatal to non-moving parties when opposing a motion for summary decision that has been supported by affidavits. See, for example, **Fitzpatrick v. Human Rights Commission**, 267 Ill.App.3d 386, 642 N.E.2d 486, 204 Ill.Dec. 785 (4th Dist. 1994).

Additionally, Complainant's assertion that Respondent must have discriminated against him because management believed that his back impairment made him more susceptible to future injury is without merit. While I agree that evidence of this belief could form the basis of a successful lawsuit under the FEPA, I would also note that Complainant's only evidence in this regard came from the affidavit of a firefighter who was not a decision-maker. Here then, Complainant loses because he cannot show that he had an actual handicap under the FEPA,

and because he failed to present any evidence that Respondent's management perceived him to have had a substantial limitation on a major life activity under the FEPA.

**Recommendation**

For all of the above reasons, it is recommended that:

1. Complainant's motion to amend his Complaint to add a "regarded as" component to his handicap discrimination claim be **granted**.

2. Complainant's motion for summary decision be **denied**.

3. Respondent's motion for partial summary decision as to various procedural issues be **denied**.

4. Respondent's motion for summary decision on the issue of liability be **granted**, and that the Complaint and the underlying Charge of Discrimination of Edward W. Books Jr. be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 12th DAY OF DECEMBER, 2001.